Supreme Court, U.S.
FILED

(1)

021798 JUN 9 2003

No. _____

IN THE

Supreme Court of the United States

BRIAN SHEPPARD,

Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN SHEPPARD
Counsel of Record
for Petitioner
516 N. 9th Street
Second Floor
New Hyde Park, NY 11040
(516) 358-7599

43 pp

QUESTIONS PRESENTED

1. Whether a federal court properly may dismiss a law clerk's complaint alleging that the judge for whom the clerk worked violated the Fourth Amendment in searching the clerk's office and seizing and searching the clerk's belongings therein to find and confiscate the clerk's personal notes about the judge's official misconduct, by holding that (a) law clerks as a class have no legitimate expectation of privacy against searches of their offices, desks, and filing cabinets, and (b) the seizure and search of a public employee's belongings is permissible if the public employer asserts that the seizure and search were effected to locate documents belonging to the employer.

2. Whether a public employer, consistent with the First Amendment, may discharge an employee in retaliation for the employee's private objections to the employer about the employer's serious and ongoing official misconduct by simply (a) having the employee confirm prior to the discharge that the employee would make the misconduct public if discharged or (b) denying the misconduct after the discharge and citing the confidential nature of the employee's position.

3. Whether a person is seized within the meaning of the Fourth Amendment when government officers force the person to accompany them out of a building.

4. Whether the First Amendment prohibits court officials from ejecting a person from a courthouse, and barring that person's reentry, in the absence of any legitimate governmental interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. The 1991 Complaint 1
II. The 1993 Dismissal and *Sheppard I* 4
III. The 1995 Dismissal and *Sheppard II* 5
IV. The 2002 Grant of Summary Judgment and *Sheppard III* 6

REASONS FOR GRANTING THE WRIT 9

I. THE SECOND CIRCUIT'S DECISIONS BELOW SERIOUSLY CONFLICT WITH CASES FROM THIS COURT AND OTHER CIRCUITS, AND CONSTITUTE HIGHLY UNDESIRABLE PUBLIC POLICY. 9
A. Office and Property Searches and Seizures 9
1. Searches of Offices, Desks, and Filing Cabinets 9
2. Seizures and Searches of Personal Property 12
3. The Advent of Office Computers 15
B. Forcible Movements of Persons 16
C. Exclusion of Citizens from Courthouses 18
D. Discharge in Violation of Free Speech 19

1. Motivation of Employer in *Prima Facie* Case 19
a. Illegal Motivations 19
b. Confirming Willingness to Go Public . . 20
2. The Balancing Defense 21
a. Private, Truthful Speech About Employer's Misconduct 22
b. Confidential Nature of Relationship . . . 23
c. Irrelevance of the Expletive 25

II. MANY ADDITIONAL CONSIDERATIONS COALESCE TO MAKE THE GRANT OF CERTIORARI CRITICALLY IMPORTANT 26

A. This Is Most Likely the Court's Only Chance to Address The Issues Concerning the First and Fourth Amendment Rights of Law Clerks . . . 26

B. No One Else Will Deal With Clandestine, Improper Attempts by Judges and Prosecutors to Obtain Convictions 26

C. There Is No Reason to Believe These Problems Are Limited to New York 27

D. Denial of Certiorari Will Proliferate Misconduct 28

E. The Misconduct at Issue Does Not Harm Only *Guilty* Criminal Defendants 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page(s)

Andresen v. Maryland, 427 U.S. 463 (1976) 13

Arizona v. Hicks, 480 U.S. 321 (1987) 13

Barker v. Del City, 215 F.3d 1134 (10th Cir. 2000) 24

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) 20, 24

Bonds v. Milwaukee County, 207 F.3d 969 (7th Cir. 2000) 24

Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998) 24

Brecht v. Abrahamson, 507 U.S. 619 (1993) 30

Brown v. Glines, 444 U.S. 348 (1980) 11

California v. Hodari D., 499 U.S. 621 (1991) 17

Connick v. Myers, 461 U.S. 138 (1983) 20, 22, 25

Cutliffe v. Cochran, 117 F.3d 1353 (11th Cir. 1997) 24

Dunaway v. New York, 442 U.S. 200 (1979) 17

Fazio v. City and County of San Francisco, 125 F.3d 1328 (9th Cir. 1997) 24

Fisher v. United States, 425 U.S. 391 (1976) 13

Florida v. Bostwick, 501 U.S. 429 (1991) 17

Flynn v. City of Boston, 140 F.3d 42 (1st Cir. 1998) 24

Forrester v. White, 484 U.S. 219 (1988) 11, 26

Forrester v. White, 792 F.2d 647 (7th Cir.) (Posner, J., dissenting), *rev'd*, 484 U.S. 219 (1988) 26

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 22

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 21

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 18

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 24

Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) 24

Jones by Jones v. Webb, 45 F.3d 178 (7th Cir. 1995) 17

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 22

Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001) 16

Liteky v. United States, 510 U.S. 540 (1994) 30

Mapp v. Ohio, 367 U.S. 643 (1961) 28-29

Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986) (per curiam) 22

Marshall v. Porter County Plan Commission, 32 F.3d 1215 (7th Cir. 1994) 22

McEvoy v. Spencer, 124 F.3d 92 (2d Cir. 1997) 23

McVey v. Stacy, 157 F.3d 271 (4th Cir. 1998) 22, 24

Michigan v. Chesternut, 486 U.S. 567 (1988) 17

Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1994) 18

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) .. 21, 25

Muick v. Glenayre Elecs., 280 F.3d 741 (7th Cir. 2002) 15

New Jersey v. T.L.O, 469 U.S. 325 (1985) 13

O'Connor v. Ortega, 480 U.S. 709 (1987) 9-15

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993) 22

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996) 23

Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) 28

Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1994) 18

Ortega v. O'Connor, 146 F.3d 1149 (9th Cir. 1998) 14

Perry v. Sindermann, 408 U.S. 503 (1972) 21

Pickering v. Board of Education, 391 U.S. 563 (1968) 19, 21-25

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) 18

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984) 18

Rankin v. McPherson, 483 U.S. 378 (1987) 20-23

Republican Party of Minnesota v. White,
122 S. Ct. 2528 (2002) 29-30

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) (plurality opinion) 22

Robinson v. Town of Colonie, 878 F. Supp. 387
(N.D.N.Y. 1995) 17

Rose v. Stephens, 291 F.3d 917 (6th Cir. 2002) 24

Roth v. Veteran's Administration, 856 F.2d 1401
(9th Cir. 1988) 22

Schowengerdt v. General Dynamics Corp.,
823 F.2d 1328 (9th Cir. 1987) 11

Sheppard v. Beerman, 18 F.3d 147
(2d Cir. 1994) (*Sheppard I*) 1, 4-6, 10-11, 14-17, 19, 26

Sheppard v. Beerman, 94 F.3d 823
(2d Cir. 1996) (*Sheppard II*) 1, 6

Sheppard v. Beerman, 317 F.3d 351
(2d Cir. 2003) (*Sheppard III*) 1, 9, 19-23, 25-26

Sheppard v. Beerman, 513 U.S. 816 (1994)
(denial of certiorari from *Sheppard I*) 5

Sheppard v. Beerman, 822 F. Supp. 931
(E.D.N.Y. 1993) (*Sheppard I* below) 1, 4

Sheppard v. Beerman, 911 F. Supp. 606 (E.D.N.Y. 1995) (*Sheppard II* below) 1, 5

Sheppard v. Beerman, 190 F. Supp. 2d 361 (E.D.N.Y. 2002) (*Sheppard III* below) 1

Shields v. Burge, 874 F.2d 1201 (7th Cir. 1989) 11

Sibron v. New York, 392 U.S. 40 (1968) 17

Solomon v. Royal Oak Township, 842 F.2d 862 (6th Cir. 1988) 22

Stanford v. Texas, 379 U.S. 476 (1965) 13

Stewart v. Evans, 275 F.3d 1126 (D.C. Cir. 2002) 13

United States v. Carver, 260 U.S. 482 (1923) 5

United States v. Chadwick, 433 U.S. 1 (1977) 13

United States v. Chapman, 954 F.2d 1352 (7th Cir. 1992) 11

United States v. Chavez, 281 F.3d 479 (5th Cir. 2002) 17

United States v. Craig, 32 M.J. 614 (A.C.M.R. 1991) 11

United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105 (2002) 17

United States v. Fernandes, 272 F.3d 938 (7th Cir. 2001) 13

United States v. Gonzalez, 300 F.3d 1048 (9th Cir. 2002) 14

United States v. Grant, 920 F.2d 376 (6th Cir. 1990) 18

United States v. Johnson, 16 F.3d 69, *rehearing granted on other grounds*, 18 F.3d 293 (5th Cir. 1994) 15

United States v. Little, 60 F.3d 708 (10th Cir. 1995) 18

United States v. Madrid, 30 F.3d 1269 (10th Cir. 1994) 18

United States v. Mancini, 8 F.3d 104 (1st Cir. 1993) 13

United States v. Mendenhall, 446 U.S. 544 (1980) (plurality opinion) 17

United States v. Minsky, 963 F.2d 870 (6th Cir. 1982) . 29

United States v. Neal, 41 M.J. 855 (A.F. Ct. Crim. App. 1994) 11

United States v. Place, 462 U.S. 696 (1983) 13

United States v. Sanchez, 89 F.3d 715 (10th Cir. 1996) 18

United States v. Simons, 206 F.3d 392 (4th Cir. 2000) 15

United States v. Slanina, 283 F.3d 670 (5th Cir.), *vacated on other grounds*, 123 S. Ct. 69 (2002) 15

United States v. Taketa, 923 F.2d 665 (9th Cir. 1991) 11

United States v. Weaver, 282 F.3d 302 (4th Cir.), *cert. denied*, 123 S. Ct. 186 (2002) 18

Walker v. Darby, 911 F.3d 1573 (11th Cir. 1990) 14

Waller v. Georgia, 467 U.S. 39 (1984) (unanimous decision) 18

Walter v. United States, 447 U.S. 649 (1980) 13

Waters v. Churchill, 511 U.S. 661 (1994) 20-21, 24-25

Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980) 11

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 22

Yohn v. Love, 76 F.3d 508 (3d Cir. 1996) 29

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 13

* * * * *

Constitutions, Statutes, and Rules

U.S. Const., amend. I 1-2, 5, 18-19, 26

U.S. Const. amend. IV 1-2, 4-5, 12-13, 15, 17, 26, 29

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

Fed. R. Civ. P. 12(c) 4

N.Y. Comp. Codes R. & Regs. tit. 22,
§ 100.3(B)(1) (2002) 25

N.Y. Comp. Codes R. & Regs. tit. 22,
§ 100.3(C)(3) (2002) 25

N.Y. Comp. Codes R. & Regs. tit. 22,
§ 100.5 (2002) 25

* * * * *

Other Authorities:

Christine C. Biederman, *In Center of Judicial Storm Is a Federal Judge in Texas,* N.Y. Times, Nov. 5, 1995, § 1, at 24 28

Mervin Block, *Judges and the Press: The Power to Suppress,* 16 Loy. U. Chi. L.J. 445 (1985) 28

Alan M. Dershowitz, *The Best Defense* (1982) 7

Marvin E. Frankel, *A Matter of Opinions,* N.Y. Times, May 15, 1994, § 4, at 15 12

Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias,* 30 Hofstra L. Rev. 121 (2001) 28

Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges--A Proposed Solution to the Real Problem,* 25 Hofstra L. Rev. 729 (1997) 27

David Heilbroner, *Rough Justice: Days and Nights of a Young D.A.* (1990) 7

James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000) 30

Mario Merola, *Big City D.A.* (1988) 7

Joyce Purnick, *Judge Wins This Round by Losing*, N.Y. Times, Apr. 24, 1996, at B1 27

Robert Stern et al., *Supreme Court Practice* (8th ed. 2002) 5

Anthony R. Valukas, *The Lesson of Greylord: Many Lawyers and Judges Tolerate Brethren Who Cheat and Lie*, 14 B. Leader 13 (May-June 1986) 28

Petitioner Brian Sheppard respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App. 1a-10a, 11a-21a, and 22a-30a)[1] are reported at 18 F.3d 147, 94 F.3d 823, and 317 F.3d 351, respectively.

The opinions of the United States District Court for the Eastern District of New York (Glasser, D.J.) (App. 31a-53a, 54a-76a, and 77a-117a) are reported at 822 F. Supp. 931, 911 F. Supp. 606, and 190 F. Supp. 2d 361, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2003. A timely petition for rehearing was denied on March 11, 2003. (App. 148a-149a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides in relevant part that governments "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the United States Constitution, similarly made applicable to the States, provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

---

[1]All of the appendix material for this Petition appears in one separately bound volume. Pagination in the Appendix includes the suffix "a."

STATEMENT OF THE CASE

Petitioner is an attorney who graduated from Stanford Law School in 1979. Between 1986 and 1990, he served as the sole law clerk to Respondent, then a New York State Supreme Court justice presiding over criminal cases. During that period, Petitioner was exposed to serious, ongoing, widespread misconduct on the part of Respondent, other judges, and prosecutors. When, in December of 1990, Petitioner raised strong objections to Respondent about the misconduct and acknowledged that he might publicize his notes about the misconduct, Respondent discharged him, had him forcibly ejected from the courthouse, searched his office and belongings therein, and seized his belongings.

In 1991, Petitioner filed this action for damages and equitable relief in the United States District Court of the Eastern District of New York, primarily under 42 U.S.C. § 1983. The Complaint (App. 150a-159a) alleged, *inter alia*, violations of Petitioner's First Amendment rights to free speech and access to criminal proceedings, and his Fourth Amendment right to be free from unreasonable searches and seizures. (App. 157a ¶ 38.) In 1994, the United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of all of the claims other than the free speech claim, but vacated the District Court's dismissal of that claim. In 1996, the Second Circuit vacated the District Court's second dismissal of the free speech claim. In 2003, the Second Circuit affirmed the District Court's grant of summary judgment to Respondent on that claim.

I. The 1991 Complaint

The Complaint provided examples of the misconduct that occurred in two cases that were before Respondent at the time of the parties' December 1990 argument. Respondent had had one of those cases--a vehicular homicide--assigned to him so that he could exact revenge against the defendant for having been rearrested, told Petitioner that he would do all he could to obtain a conviction, and followed through on

that promise. (App. 151a-152a ¶¶ 8-9, 12.)

In the other case--a murder prosecution--Respondent had had improper *ex parte* communications with the prosecution. On December 6, 1990, Respondent ordered Petitioner to draft a decision in that case denying the defendant's speedy trial motion without a hearing, regardless of the merits, so that the defendant would stand trial, and at a time desired by the prosecution. (App. 151a-152a ¶¶ 8, 10.)

At the outset of the following day, Petitioner refused to follow the order. Respondent then told him to look for another job. Petitioner declined, saying *he* was not the one who had acted improperly. Respondent denied any impropriety until Petitioner reminded him of his misconduct in the vehicular manslaughter case and other cases, and indicated that Petitioner had taken notes of courthouse events. (App. 152a ¶¶ 11-12.)

Respondent expressed concern as to whether and when Petitioner would make his notes public. He responded that he was not certain, but that he would no longer have a duty of loyalty to Respondent if Respondent continued to pressure him into taking part in misconduct. (App. 152a ¶ 13.)

During the argument, voices were raised, and Respondent called Petitioner "disturbed" and "disloyal," while Petitioner said that Respondent was "corrupt" and a "son-of-a-bitch." Petitioner immediately apologized for the expletive, after which Respondent said nothing about it. But Respondent's adamant protestations, that his intermittent wrongdoing did not render him "corrupt," failed to persuade Petitioner. (App. 152a-153a ¶¶ 14-15.)

The argument ended with no resolution. Petitioner worked the remainder of the day without incident. After the intervening weekend and his illness on December 10, he returned to work on the 11th. In that intervening period, Respondent fruitlessly searched Petitioner's office for the notes, but did find something that caused Respondent to fear that Petitioner intended to report on judicial misconduct on December 12. (App. 153a-154a ¶¶ 16, 18-19.)

On December 11, after Petitioner had been working in chambers for two hours and Respondent had not yet shown

up, armed, uniformed court officers entered chambers, advised Petitioner that he had been discharged, and escorted him out of the *courthouse*, telling him that he had to leave the courthouse with them right then, without his belongings. Respondent then searched Petitioner's office again, including the desk drawers and filing cabinets, and removed Petitioner's personal file cards into Respondent's office and examined them. (App. 154a-155a ¶¶ 20-25.)

When Petitioner returned to his office on December 13 in the company of court officers so that he could recover his belongings, he was prevented from taking his personal files with him. After Respondent examined those files, they were given to Petitioner on December 17. (App. 155a ¶¶ 26-27.)

The various seizures and searches were supported by neither the policies nor customs of Respondent or other New York judges. (App. 155a ¶ 29.)

II. The 1993 Dismissal and *Sheppard I*

Respondent's first motion for judgment on the pleadings, *see* Fed. R. Civ. P. 12(c), was argued and deemed submitted in April of 1992. After Petitioner in April of 1993 effectively obtained a writ of mandamus from the Second Circuit forcing the District Court to decide the motion within 30 days, the District Court granted the motion and dismissed the case. 822 F. Supp. 931. (App. 31a-53a.) The Second Circuit vacated the dismissal of the free speech claim, and otherwise affirmed. *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir. 1994) [hereinafter *Sheppard I*] (App. 1a-10a).

Sheppard I (App. 7a-8a) dismissed the Fourth Amendment claim as to the searches of Petitioner's office, desk, and filing cabinets, expressly adopting the ground *sua sponte* raised by the District Court (App. 44a-45a) that, unlike all other government employees, law clerks as a class have no reasonable expectation of privacy in such places. While the Complaint alleged that Respondent seized and searched Petitioner's belongings, including his personal file cards and files, for the purpose of confiscating his notes on Respondent's misconduct (App. 153a-155a ¶¶ 18(a), 24-27), *Sheppard*

I (App. 8a-9a) dismissed the Fourth Amendment claim as to those seizures and searches on the ground that a short delay in searching the belongings of a discharged employee is reasonable to prevent the employee from destroying or confiscating government property.

Although Petitioner argued to both courts below that he was seized in violation of the Fourth Amendment when he accompanied armed court officers from Respondent's chambers to outside the courthouse pursuant to their order to him (*e.g.*, Pet. C.A. *Sheppard I* Br. 30-34), *Sheppard I* (App. 9a) explicitly agreed with the District Court's *sua sponte* holding (App. 45a n.3) that Petitioner was not seized because he was free to go anywhere outside the courthouse after he was forced to leave the building. While Petitioner argued to both courts that his First Amendment right to be in the courthouse was violated by his forcible removal therefrom for no legitimate governmental purpose (*e.g.*, Pet. C.A. *Sheppard I* Br. 35-38), both courts dismissed this claim without addressing it (App. 6a-7a, 9a, 42a-43a).

Finally, *Sheppard I* (App. 5a-6a) vacated the District Court's dismissal of the free speech claim (App. 34a-42a) for ignoring the allegations in the Complaint (*e.g.*, App. 150a, 153a-154a ¶¶ 1, 18, 21) as to Respondent's motivation in discharging Petitioner.[2]

III. The 1995 Dismissal and *Sheppard II*

Before the taking of depositions began, Respondent again moved for judgment on the pleadings as to the free speech claim, renewing his earlier arguments. In 1995, the District Court granted the motion and dismissed the case again. 911 F. Supp. 606. (App. 54a-76a.) In dismissing the request for damages, the court *sua sponte* held that the issue of an

---

[2]This Court denied Petitioner's application for certiorari from some of the rulings in *Sheppard I* adverse to him. *Sheppard v. Beerman*, 513 U.S. 816 (1994). Of course, that earlier denial does not preclude or affect the instant application. *United States v. Carver*, 260 U.S. 482, 490 (1923); Robert Stern et al., *Supreme Court Practice* § 4.18, at 260-61 (8th ed. 2002).

employer's intent in a free speech retaliation case is *irrelevant* in the context of qualified immunity. (App. 67a-71a.)[3] The court also *sua sponte* dismissed the request for declaratory and injunctive relief. (App. 71a-75a.) In *Sheppard v. Beerman*, 94 F.2d 823 (2d Cir. 1996) [hereinafter *Sheppard II*], the Second Circuit vacated every aspect of this second dismissal as being contrary to the law and the facts alleged in the Complaint. (App. 11a-21a.)

IV. The 2002 Grant of Summary Judgment and *Sheppard III*

In 2000, after substantial discovery, Respondent moved for summary judgment on the remaining, free speech claim. The evidence Petitioner provided in opposition to the motion closely conformed to the allegations in the Complaint--largely on the basis of Petitioner's own deposition testimony--but with the following particularly noteworthy additions.

Petitioner's testimony expanded on the types and scope of the misconduct he observed during his tenure with Respondent. This included improper *ex parte* communications involving Respondent and other judges, on the one hand, and prosecutors--including some at the highest levels--on the other hand, and Respondent's physically altering his jury standard jury charge forms for the expressed purpose of increasing the likelihood of conviction against certain defendants. (C.A. *Sheppard III* App. 497-500, 508-09, 522-23, 554, 557-58, 576-77, 598-99, 602-04, 622, 630.)

To support his testimony about this latter form of misconduct, Petitioner formally requested from Respondent the jury charge documents he used in all of his criminal cases during Petitioner's tenure with him. Respondent admitted at his deposition that after receiving and reading the document request, he intentionally destroyed all of those documents

---

[3]In its first dismissal decision, the District Court did not address Respondent's qualified immunity argument. While Petitioner asked the *Sheppard I* court to reach that issue, Respondent did not join in that request, and *Sheppard I* did not address the issue either.

instead of complying with the request. (App. 160a-168a.)

Petitioner sought to depose various witnesses to further corroborate his testimony about misconduct. However, the magistrate judge delayed the case for a total of more than a year by *sua sponte* raising the issue whether any such depositions would be proper, and ultimately ruled that Petitioner could not depose *any* current or *former* judges (aside from Respondent) or *law clerks* about the existence of any misconduct, and further severely restricted Petitioner's ability to depose current and former prosecutors on the subject. (App. 132a-147a.) Nevertheless, various prosecutorial supervisors testified to the accepted practice in their office of engaging in improper *ex parte* communications with judges and their law clerks. (App. 169a-200a.)[4]

Respondent testified that one of the reasons for the discharge was that Petitioner's allegations of misconduct were false. (C.A. *Sheppard III* App. 406-07.) Respondent also testified that one of the reasons was Petitioner's use of an expletive. However, Respondent testified that Petitioner did not apologize for the expletive, and that he could not say whether he would have discharged Petitioner had Petitioner apologized. (*Id.* at 403, 437.) Respondent himself would use expletives in chambers in Petitioner's presence, including referring to prosecutors as "miserable bastards." (*Id.* at 526.) Prior to the December 1990 argument, Respondent grudgingly had accepted Petitioner's rough way of objecting to some of Respondent's misconduct, and had altered his behavior to some extent in response to those objections. (*Id.* at 497-98, 507-09, 578, 600, 605, 610-11.)

Respondent testified that, minutes or hours before the discharge, he visited the administrative judge, who not only opined that Petitioner should be discharged, but insisted that Petitioner be removed from the courthouse. (*Id.*. at 409-10.) The administrative judge and his administrative assistant, on

---

[4]Such improper communications are hardly limited to the county in which Respondent sat. Alan M. Dershowitz, *The Best Defense* 102 (1982); David Heilbroner, *Rough Justice: Days and Nights of a Young D.A.* 238 (1990); Mario Merola, *Big City D.A.* 32, 50 (1988).

the other hand, testified that Respondent merely had *phoned* the administrative judge, indicating that Petitioner *had been discharged* but refused to leave chambers, and that the administrative judge merely ordered that Petitioner be removed from *chambers*, as he had a right to remain in the courthouse. (*Id.* at 685-92.) The three court officers involved in the removal of Petitioner from the courthouse could not explain what the reason or purpose for the removal was, as Petitioner was behaving calmly during their interaction with him and he had a right to remain in the courthouse. (*Id.* at 816-20, 822, 827, 832, 858-60, 865-66, 869-70.) Those officers and other witnesses testified to the unprecedented nature of Petitioner's removal from the courthouse, and of the removal of a discharged law clerk from chambers without the clerk's first having the opportunity to gather his belongings. (*Id.* at 666, 670, 679-80, 684-85, 692-93, 701-02, 711-12, 718-19, 726, 814-15, 820-21, 823-24, 826, 828-30, 856-64, 866-67.)

Respondent testified that he knew nothing about any searches of Petitioner's office, or about Petitioner's being prevented from taking his belongings with him when he was removed from the courthouse. Respondent also denied knowing that Petitioner was prevented from taking his personal files with him when he returned to chambers to retrieve his belongings. While admitting that he removed Petitioner's personal file cards into his own office, he denied examining them.

Petitioner testified that during the argument--which took place in Respondent's office with no one else present--Respondent asked how he remembered Respondent's misconduct so well, and he replied that he had taken notes of courthouse events; when Respondent asked when he intended to go public, he responded that he did not know, but that he would go public if left with no options but to take part in misconduct, resign, or be fired. (*Id.* at 509-10, 518, 520-21, 525, 528, 559-60, 574, 629-30, 722-23, 1304 ¶ 9, 1309 ¶¶ 35-37.) Petitioner also testified that his notes--which he produced during discovery--focussed on the misconduct of others, not Respondent. Respondent testified that during the argument, there was no mention of any notes or going public.

A year after Respondent's summary judgment motion was deemed submitted, the District Court granted the motion. (App. 77a-117a.) In *Sheppard v. Beerman*, 317 F.3d 351 (2d Cir. 2003) [hereinafter *Sheppard III*], the Second Circuit affirmed that dismissal. (App. 22a-30a.)

Although Petitioner had contended throughout the litigation that Respondent discharged him for a number of improper reasons, including to punish him for his speech about misconduct, *Sheppard III* simply examined the question whether Respondent discharged Petitioner to deter Petitioner from making the misconduct public, and held that as a matter of law a public employer does not discharge an employee for that purpose where, as here, the employee confirms that he will publicize the misconduct if discharged. (App. 28a-30a.) Also, without addressing the issues of the truth of Petitioner's claims about misconduct, the seriousness of that misconduct, or the private nature of Petitioner's speech, and without allowing a jury to determine Respondent's motivations for the discharge, *Sheppard III* held that the discharge was proper because Petitioner uttered an expletive. (App. 27a-28a.) On March 11, 2003, the Second Circuit denied Petitioner's petition for rehearing and rehearing *en banc*. (App. 148a-149a.)

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISIONS BELOW SERIOUSLY CONFLICT WITH CASES FROM THIS COURT AND OTHER CIRCUITS, AND CONSTITUTE HIGHLY UNDESIRABLE PUBLIC POLICY.

A. Office and Property Searches and Seizures

1. *Searches of Offices, Desks, and Filing Cabinets*

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), all nine Justices agreed that, at a minimum, a public employee has a reasonable expectation of privacy from searches of his or her office, desk, and file cabinets, unless, under the circumstances

of the employee's particular case, that expectation has been "reduced by virtue of actual office practices and procedures, or by legitimate regulation."[5] Here, the Complaint alleged,

> It is neither the policy nor custom of defendant or other New York judges to search their law clerk's office or seize any objects therefrom, except to the extent that materials belonging to the court or the judge, located in plain view or in file cabinets, might be briefly sought and removed as needed for legitimate court purposes . . . .

(App. 155a ¶ 29(a).) Despite *Ortega* and the Complaint, *Sheppard I* held that judicial law clerks have "'no reasonable expectation of privacy in chambers' appurtenances, embracing desks, filing cabinets or other work areas.'" (App. 8a (quoting App. 45a).) The court based its conclusion on its belief that "[t]he working relationship between a judge and her law clerk . . . is unique" (App. 8a), and that no judge's chambers could function properly unless the judge has complete access to everything to which the clerk has access (*id.*).

Obviously, *Sheppard I* ignores the minimum rule of *Ortega* that the employee's expectation of privacy must be addressed on a case-by-case basis, and can be reduced only because of actual office practices and procedures or legitimate regulation. Indeed, in scouring the cases cited in *Ortega* and *all* cases, federal or state, which have cited it over these 16 years, the undersigned has been unable to locate any

---

[5]The four-judge plurality opinion stated that "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis," 480 U.S. at 718, examining whether the employee's expectation of privacy has been "reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717. Judge Scalia, concurring in the judgment, took the position that *all* government employees have a reasonable expectation of privacy in their offices, desks, and filing cabinets unless their offices are subject to unrestricted public access. *Id.* at 730-32. The four-justice dissent also found the plurality opinion to be too restrictive of public employees' rights to privacy in their offices, desks, and filing cabinets. *Id.* at 737-41.

case other than *Sheppard I* in which it even was argued, much less held, that a certain class of government employees has no reasonable expectation of privacy in their offices, desks, or file cabinets regardless of the policies or customs in their particular workplaces.[6] This is true even as to law enforcement or military employees,[7] even though they traditionally have received less Fourth (and First) Amendment protection than over government employees.[8]

In light of both *Ortega* and common sense, it is simply untenable that no judicial chambers could function unless the judge has free reign to go through the law clerk's office, desk, and filing cabinets without restraint. Indeed, the District Court below, unlike the Second Circuit, apparently believed that only judges in "large metropolitan areas" need such free reign. (App. 44a-45a.) Nor is it reasonable to take the position that if, because of the particular duties, needs, beliefs, relationships, policies, or practices of the judge, law clerk, or judicial system in question, certain judges in fact are able to manage without having such intrusive access into their law clerk's work areas, then such law clerks should not then have the benefit of the Fourth Amendment's protection.

Moreover, *Sheppard I* singled out judicial chambers for unique treatment because of the flow of written and oral confidential information constantly exchanged between judges and their law clerks. (App. 8a.) But how is this different from the flow of such information in many executive or legislative offices? Indeed, in *Forrester v. White*, 484 U.S. 219 (1988), this Court not only rejected the notion that

---

[6]Indeed, the position was not even initially argued by Respondent, but was raised and decided *sua sponte* by the District Court. (App. 44a-45a.)

[7]*United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991); *Shields v. Burge*, 874 F.2d 1201, 1202-05 (7th Cir. 1989); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-35 (9th Cir. 1987); *United States v. Neal*, 41 M.J. 855, 860-61 (A.F. Ct. Crim. App. 1994); *United States v. Craig*, 32 M.J. 614, 615 (A.C.M.R. 1991).

[8]*Ortega*, 480 U.S. at 745 n.2 (Blackmun, J., dissenting); *Brown v. Glines*, 444 U.S. 348, 353-58 (1980); *United States v. Chapman*, 954 F.2d 1352, 1366-71 (7th Cir. 1992); *Williams v. Bd. of Regents*, 629 F.2d 993, 1003 (5th Cir. 1980).

judges, and only judges, should received absolute immunity from damages for their decisions to hire and fire confidential employees, but rejected the position taken by the Seventh Circuit in that case that a judge's need for confidence in his or her employees distinguishes judges from other public officials, *id.* at 229-30, and cautioned judges not to be overly protective of their own situations in comparison to the situations of other government employers about which they know less, *id.* at 226, and who in fact may deserve *greater* protection than judges, *id.* at 230. Indeed, as a former federal judge has written, not only have different justices of this very Court relied on their law clerks to very different degrees, but some justices of this Court have relied on their law clerks less than their counterparts in government have relied on their confidential employees. Marvin E. Frankel, *A Matter of Opinions*, N.Y. Times, May 15, 1994, § 4, at 15.

2. *Seizures and Searches of Personal Property*

While this Court in *Ortega* generally left open the question of the Fourth Amendment restrictions on a government employer's seizure or search of an employee's property, 480 U.S. at 729 n.* (plurality opinion); *see id.* at 747-48 n.14 (Blackmun, J., dissenting), that case had three important things to say on the subject. First, even the plurality, while stating that employees have no reasonable expectation of privacy in the exterior portions of belongings exposed to open view in an office, desk, or filing cabinet where an otherwise legitimate search is taking place, nevertheless unquestionably retain a reasonable expectation that an employer will not seize or search a handbag, briefcase, or closed personal luggage without probable cause. *Id.* at 716. Second, while the plurality and Justice Scalia's concurrence did not address the issue, the four-justice dissent took the position that the seizure or search of personal property, and particularly the inspection of private papers, during the search of an office, desk, or filing cabinet requires greater justification than the initial search. *Id.* at 738 n.5, 747-48 n.14. Third, the implication in all of the *Ortega* opinions is that

since the search of an office, desk, or filing cabinet can be justified only if its purpose *in fact* was a legitimate, work-related one--and thus, a search purportedly effected to prevent the confiscation or destruction of the employer's property by a discharged or suspended employee can be justified only if a policy or practice permits such a search *and* the search *in fact* was effected for that purpose[9]--then the seizure or search of property which *in fact* was not effected for such a purpose would be violative of the Fourth Amendment. *Id.* at 723, 725-28 (plurality opinion); *id.* at 732 (Scalia, J., concurring); *id.* at 732-48 (Blackmun, J., dissenting).

Thus, in general, this Court has recognized that: searches or seizures of private property are reasonable only if effected *in fact* for legitimate governmental purposes, *New Jersey v. T.L.O*, 469 U.S. 325, 335 (1985); *United States v. Place*, 462 U.S. 696, 703-06 (1983); special justification is required for the examination of private papers;[10] and separate justification is required to search or seize private property discovered as a result of a proper initial search or seizure. *Arizona v. Hicks*, 480 U.S. 321, 324-29 (1987); *United States v. Chadwick*, 433 U.S. 1, 3-5, 11-16 (1977). Accordingly, in the wake of *Ortega*, federal courts have held that a government employer's seizure or search of an employee's personal documents is covered by *Ortega*'s general reasonable expectation analysis,[11] and that, under *Ortega*, a search or seizure of a public employee's written or oral statements is constitutional only

---

[9] *Accord United States v. Fernandes*, 272 F.3d 938, 942-43 (7th Cir. 2001).

[10] *Zurcher v. Stanford Daily*, 436 U.S. 547, 563-64 (1978); *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976); *Stanford v. Texas*, 379 U.S. 476 (1965). This is particularly so where, as here, "the basis for the seizure is disapproval of the message contained therein." *Walter v. United States*, 447 U.S. 649, 655 (1980) (Stevens, J., announcing the judgment of the Court).

[11] *Stewart v. Evans*, 275 F.3d 1126, 1129-31 (D.C. Cir. 2002) (employee's notes of employers' misconduct); *United States v. Mancini*, 8 F.3d 104, 108-10 (1st Cir. 1993) (appointment calendar, containing personal and work-related entries, maintained in office archives and accessible to secretary).

if effected *in fact* for a legitimate, work-related reason.[12]

But in *Sheppard I*, the Second Circuit acted contrary to all of these cases from this Court and elsewhere. The Complaint alleges that: "[i]t is neither the policy nor custom of defendant or other New York judges when firing a law clerk, to physically remove him from the courthouse or deny him the opportunity to gather his belongings before others intrude upon his office and property therein" (App. 155a ¶ 29(b)); nevertheless, upon being advised of his discharge, Petitioner was also advised that he could not take his belongings with him at that time (App. 154a ¶ 22); Respondent removed Petitioner's personal file cards and examined them (App. 154a-155a ¶ 24-25); when Petitioner returned to chambers two days later, he was not permitted to take his personal files until Respondent had four additional days to examine them (App. 155a ¶ 26-27); and Respondent effected these seizures and searches for the purpose of finding and confiscating Petitioner's notes of Respondent's misconduct (App. 153a ¶ 18(a)).[13]

Petitioner clearly argued to both courts below that on the basis of *Ortega* and these allegations, the seizures and searches of his property violated the Fourth Amendment. (*E.g.*, Pet. C.A. *Sheppard I* Br. 25-27.) Yet *Sheppard I*, agreeing with the District Court (App. 43a-44a), held, "Because a judicial employer has an overriding interest in securing the confidentiality of chambers' work product and in making sure that an angry clerk does not attempt to confiscate or destroy important court property, the brief alleged withholding of Sheppard's belongings while they

---

[12] *United States v. Gonzalez*, 300 F.3d 1048, 1055 (9th Cir. 2002) (employee's signing consent to search of backpack for theft does not entail consent to read employee's papers in backpack); *Ortega v. O'Connor*, 146 F.3d 1149, 1152, 1159-64 (9th Cir. 1998); *Walker v. Darby*, 911 F.3d 1573, 1579 n.8 (11th Cir. 1990) (employers bugged employee's office conversations in pursuit of their personal vendetta against him).

[13] Respondent testified that there were no searches of Petitioner's property, and that he was permitted to take his belongings with him at the time of his discharge. *See supra* p. 8,

were searched was not unreasonable." (App. 9a.) This language would even permit an automatic right to search, and closely examine the contents of, a discharged employee's handbag or briefcase.

Indeed, since *Sheppard I*s holding that law clerks have no reasonable expectation of privacy in their offices, desk, and file cabinets is based on the necessity that there be "an absolutely free flow of information between the clerk and judge" (App. 8a), it would follow that law clerks have no reasonable expectation of privacy in their belongings--which might contain or appear to be court files or "the clerk's notes from discussions with the judge" (App. 8a)--even when they are not discharged. This would include their handbags, briefcases, and closed luggage, as law clerks sometimes take work-related documents home or on vacation.

3. *The Advent of Office Computers*

The holdings in *Sheppard I* regarding the searches of Petitioner's office, desk, and file cabinets, and the subsequent seizure and search of his personal property, is particularly troublesome in light of the extent to which public employees are now furnished computers. Computers are largely the modern version of the desk and filing cabinet. They contain office-related files and information, but also personal files and information. While some circuit courts, citing *Ortega*, have held that a public employer may seize, search, or monitor computers where the employee is given advance notice of a policy so permitting, or where the seizure or search *in fact* is effected for a legitimate work-related purpose,[14] the logic of *Sheppard I* would allow judges unrestrained access under the Fourth Amendment to *everything* in the law clerk's computers and disks, not only in the

---

[14] *United States v. Slanina*, 283 F.3d 670, 677-80 (5th Cir.), *vacated on other grounds*, 123 S. Ct. 69 (2002); *Muick v. Glenayre Elecs.*, 280 F.3d 741, 742-43 (7th Cir. 2002) (Posner, J.); *United States v. Simons*, 206 F.3d 392, 398-401 (4th Cir. 2000); *United States v. Johnson*, 16 F.3d 69, 71, 73-74, *rehearing granted on other grounds*, 18 F.3d 293 (5th Cir. 1994).

absence of such an announced policy, but even in the *presence* of policies and practices seemingly providing some privacy protection for the law clerk. Indeed, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), in finding that a government employee had a reasonable expectation of privacy in personal information stored in his office computer in the absence of an announced policy to the contrary, the Second Circuit contrasted *Sheppard I* in that there is a "'unique' relationship between a judge and her clerk necessitating a 'distinctive open access to documents.'" *Id.* at 74 (quoting App. 8a).

In fact, in an open letter to federal judges dated September 4, 2001, federal circuit judge Alex Kozinski wrote that proposed rules removing the privacy of federal judicial employees, including judges and their law clerks, in all information in their office computers--including personal e-mails and prescriptions filled online--would give "'employers a near-Orwellian power to spy and snoop into the lives of their employees'" (quoting a fellow judge), causing "loyalty and dedication [to] wilt." Thus, it is likely that the removal of the privacy of a law clerk would hinder, not help, "an absolute free flow of information between the clerk and the judge" which *Sheppard I* found so vital. (App. 8a.)

Moreover, *Sheppard I* based its holding that a law clerk has no reasonable expectation of privacy in his or her office, desk, or filing cabinets on the need for that "an absolute free flow of information" and for the judge's concomitant "access to the files and papers kept by the clerk," including "the clerk's notes from discussions with the judge" (App. 8a.) Accordingly, it would seem that a judge also has no reasonable expectation of privacy in his or her own office, desk, or file cabinets--or, for that matter, computer or personal belongings in chambers--in light of that absolute need for the free flow of information between judge and clerk, and because the law clerk, in drafting opinions and performing other tasks, needs full access to all files and the judge's notes from discussions with the clerk.

B. Forcible Movements of Persons

The clear rule from this Court is that an officer seizes an individual for Fourth Amendment purposes if, based on the officer's conduct and/or statements, a reasonable person would not have felt free to ignore the officer, terminate the encounter, and go about his or her business.[15] Thus, if an officer tells a person to move from one location to another and a reasonable person would feel compelled to obey, then the officer has seized the person.[16]

Although Petitioner argued to both courts below that he was seized when armed court officers forced him to accompany them from Respondent's chambers to the outside of the courthouse building, *see supra* p. 5, *Sheppard I* held that Petitioner was not seized because he "was 'free to go anywhere else that he desired,' with the exception of Beerman's chambers and the courthouse." (App. 9a (quoting App. 45a n.3).) Obviously a person ordered by armed court officers to accompany them out of a courthouse is not free to ignore them and remain in the courthouse. Indeed, the logic of *Sheppard I* would remove all Fourth Amendment restraints on the ability of government officers to force persons to move out of buildings,[17] into buildings,[18] or generally from one location to another,[19] regardless of the duration of the

---

[15] *United States v. Drayton*, 536 U.S. 194, 122 S. Ct. 2105, 2111-12 (2002); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Florida v. Bostwick*, 501 U.S. 429, 434-37, 439 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

[16] *United States v. Mendenhall*, 446 U.S. 544, 548, 557-58 (1980) (plurality opinion); *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Sibron v. New York*, 392 U.S. 40, 45, 63 (1968).

[17] *Contra Sibron*, 390 U.S. at 45, 63 (movement out of restaurant); *Jones by Jones v. Webb*, 45 F.3d 178, 180-82 (7th Cir. 1995) (movement out of house). In *Robinson v. Town of Colonie*, 878 F. Supp. 387, 392-93 (N.D.N.Y. 1995), the court held that *Sheppard I* "dictate[d]" its ruling that as a matter of law, a customer is not seized when ordered by the police to leave a store.

[18] *Contra Dunaway*, 442 U.S. at 207 (movement into police station).

[19] *Contra Mendenhall*, 446 U.S. at 548, 557-58 (no seizure because person consented to move to another location 50 feet away in same building); *United States v. Chavez*, 281 F.3d 479, 482, 484 (5th Cir. 2002) (no seizure

move[20] or the number of moves required,[21] as long as the person is allowed, for some unspecified period of time, to go about his or her business after the move.

C. Exclusion of Citizens from Courthouses

Unquestionably, members of the public have a First Amendment right of access to criminal proceedings to ensure that such proceedings are conducted fairly and properly, and that right may be abridged only for legitimate, compelling governmental purposes.[22] The Complaint clearly indicates that Respondent had court officers forcibly remove Petitioner from the courthouse and prevent his reentry, not for any legitimate governmental purpose, but to enable Respondent to search for and seize any notes of misconduct in criminal proceedings Petitioner may have brought with him to work that day; to punish Petitioner for his speech about the misconduct; and to lessen the likelihood that the public would learn about or take action against the misconduct.

---

because person consented to move across parking lot); *United States v. Sanchez*, 89 F.3d 715, 717-18 (10th Cir. 1996) (same); *United States v. Little*, 60 F.3d 708, 711, 714 (10th Cir. 1995) (movement from one area of airport terminal to baggage claim area); *Orhorhaghe v. INS*, 38 F.3d 488, 491-96 (9th Cir. 1994) (movement from hallway into person's apartment); *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1994) (movement of ten feet).

[20] *Contra United States v. Madrid*, 30 F.3d 1269, 1270-77 (10th Cir. 1994) (no seizure because person voluntarily consented to be driven into town).

[21] *Contra United States v. Weaver*, 282 F.3d 302, 307, 311-13 (4th Cir.) (no seizure because person consented to be driven in patrol car to two different banks), *cert. denied*, 123 S. Ct. 186 (2002); *United States v. Grant*, 920 F.2d 376, 378-79, 384 (6th Cir. 1990) (seizure when police continued to question person on plane despite his changing seats, and another seizure when police forced him to leave plane).

[22] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3, 7, 9, 13-14 (1986); *Waller v. Georgia*, 467 U.S. 39, 44-48 (1984) (unanimous decision); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 510-13 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598, 603-11 (1982).

(App. 150a, 153a-154a ¶¶ 1, 18, 20-23.)[23] Petitioner argued to both courts below that his First Amendment right to attend criminal proceedings therefore was infringed. *See supra* p. 5. Yet both *Sheppard I* (App. 6a-7a, 9a) and the District Court (App. 42a-43a) dismissed this argument without even addressing it. (App. 6a-7a, 9a, 42a-43a.)

D. Discharge in Violation of Free Speech

1. *Motivation of Employer in* Prima Facie *Case*

Sheppard III recognized that if Respondent discharged Petitioner out of a concern for the content of his speech about misconduct, then Petitioner would have made out a *prima facie* case of a discharge in violation of the First Amendment and the *Pickering* balancing defense[24] would be unavailable. (App. 26a-27a.) *Sheppard III* disposed of the problem in two steps: first, by ignoring Petitioner's contentions that the among the motivations for the discharge were a desire to punish Petitioner; to prevent him from further learning of or objecting to misconduct; to lessen the likelihood that others would believe or assist him; and to deter others from objecting to, or blowing the whistle on, misconduct in the future; and second, by holding that as a matter of law, a public employer who discharges an employee after obtaining confirmation from the employee that the employee will go public if discharged cannot have discharged the employee for the purpose of deterring the employee from going public, since a discharge invites publication. This solution is contrary to this Court's decisions and even the decisions of the courts below earlier in this case, and creates highly undesirable public policy.

a. *Illegal Motivations*

---

[23]Neither Respondent nor anyone else involved with removal of Petitioner from the courthouse could articulate at his or her deposition a reason for that removal. *See supra* pp. 7-8.

[24]*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

This Court has made clear that the forbidden motivations for disciplining a public employee for his or her speech include, not only the desire to deter the employee from going public, but also punishing the employee and deterring others from emulating the employee.[25] Not only did the Complaint (*e.g.*, App. 150a, 153a ¶¶ 1, 18) and Petitioner's various submissions below (*e.g.*, Pet. C.A. *Sheppard III* Br. 2, 31-34, 43) explicitly indicate that all of these forbidden motivations--particularly the retaliation motivation--were involved in this case, but the earlier decisions of the Second Circuit (App. 1a, 16a), the District Court (App. 57a, 60a, 145a), and the Magistrate Judge (App. 119a, 134a, 141a) explicitly acknowledged this. Yet *Sheppard III* wrongly stated, "At its core, Sheppard's argument is that he was terminated because he threatened to go forward and expose Beerman's corruption," and only addressed the question whether Respondent discharged Petitioner to deter him from going public. (App. 29a-30a.)

b. *Confirming Willingness to Go Public*

Petitioner testified at his deposition that during the argument, Respondent asked him how he remembered Respondent's misconduct so well, and he replied that he had taken notes of courthouse events; when Respondent asked him when he intended to go public, he responded that he did not know, but that he would go public if left with no options but to take part in misconduct, resign, or be fired. *See supra* p. 8. *Sheppard III* held that Petitioner's contention that Respondent discharged him to deter him from going public "'is *disproved*, rather than proved, by the act of termination, since that act, as described by Sheppard, was akin to an invitation to speak.'" (App. 29a (quoting App. 104a) (emphasis in District Court).)

---

[25] *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion); *id.* at 683 (Souter, J., concurring); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 144-45 (1983).

Every case from this Court involving a public employer's adverse action against an employee allegedly in violation of free speech has been a termination case.[26] Also, this Court has expressed a preference that the employee at least initially engage in private speech, as such speech is less likely to disrupt the legitimate work of the office. *Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968). Other circuits repeatedly have struck the *Pickering* balance in favor of whistleblowers and potential whistleblowers. *See infra* pp. 22-23 note 28.

But *Sheppard III* undermines all of these cases, allowing a public employer engaged in misconduct to discharge an employee who has privately expressed concern about the misconduct, simply by eliciting from the employee the obvious response that the employee will go public if discharged, with the employer safe in the knowledge that a federal court ultimately will uphold the discharge by holding as a matter of law that an employer would not discharge an employee to silence the employee because a discharge only invites publication.

2. *The Balancing Defense*

Because Petitioner adduced sufficient evidence for a jury to find that a substantial or motivating factor in the discharge was Respondent's desire to punish him for his speech about Respondent's misconduct or inhibit future activity along those lines, Respondent nevertheless was entitled to summary judgment if he established as a matter of law that the value of that speech was outweighed by the foreseeable disruption the speech would cause to the legitimate running of the office. *Waters v. Churchill*, 511 U.S. 661, 673-81 (1994) (plurality opinion); *Rankin*, 483 U.S. at 388; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285, 287 (1977)

---

[26]Cases cited in preceding note; *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sindermann*, 408 U.S. 503 (1972); *Pickering*, 391 U.S. 563.

(unanimous decision). In several important ways, *Sheppard III* considered this balancing issue in a manner profoundly at odds with decisions from this Court and other circuit courts.

a. *Private, Truthful Speech About Misconduct*

Petitioner spoke to Respondent in the privacy of Respondent's office, *see supra* p. 8, providing an important factor in Petitioner's favor. *Rankin*, 483 U.S. at 388 n.13 ("a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee"); *Pickering*, 391 U.S. at 570. The subject of Petitioner's speech--ongoing, serious, widespread judicial and prosecutorial misconduct--is a matter of utmost public concern.[27] The stronger the public interest in the employee's speech, the greater the justification needed for the employer to prevail in the *Pickering* balancing. *Connick v. Myers*, 461 U.S. 138, 152 (1983). Another important factor in the balancing is whether the employee's speech is true, or at least not knowingly or recklessly false, particularly where, as here, the employer cites the falsity of the speech as a ground for the discharge. 391 U.S. at 568-75, 578-82. Where, as here, the employee's speech concerns the employer's misconduct, circuit courts routinely strike the balance in the employee's favor--indeed, even where the employee speaks publicly; for in such situations, the employee's speech is clearly in the public interest, and it is the employer's misconduct, and his or her attempt to punish or suppress the employee's speech, which is contrary to the public interest.[28] Although Petitioner repeatedly brought

---

[27] *Connick*, 461 U.S. at 148-49; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion);*Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

[28] *E.g., McVey v. Stacy*, 157 F.3d 271, 274, 280, 282 (4th Cir. 1998);; *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1217-21 (7th Cir. 1994); *O'Connor v. Steeves*, 994 F.2d 905, 906-09, 915-17 (1st Cir. 1993); *Wulf v. City of Wichita*, 883 F.2d 842, 846-55, 861-62 (10th Cir. 1989);*Roth v. Veteran's Admin.*, 856 F.2d 1401, 1407-08 (9th Cir. 1988);*Solomon v. Royal Oak Township*, 842 F.2d 862, 863-66 (6th Cir. 1988);*Marohnic v.*

these facts and legal principles to the attention of the courts below (*e.g.*, Pet. C.A. *Sheppard III* Br. at 39-45), neither *Sheppard III* (App. 27a-28a) nor any of the other opinions of the Second Circuit or the District Court took cognizance of them.

b. *Confidential Nature of Relationship*

Instead, *Sheppard III* held, "Where an employee, such as Sheppard, 'holds an extremely confidential or highly placed advisory position, it would be unlikely [for] the *Pickering* balance to be struck in his favor.'" (App. 28a (quoting *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997)) (alteration in *Sheppard III*).) But this Court has never even suggested that the confidential or high-level nature of the employee's position creates a presumption against the employee's succeeding in the *Pickering* balancing. In *Pickering* itself, this Court noted that the highly confidential nature of the employment relationship "might" tip the balance for the employer where, unlike here, the employee engaged in "public," as opposed to private, speech. 391 U.S. at 570 n.3. In *Rankin*, this Court stated *one* of the factors in the balancing is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," 483 U.S. at 377, and that "[w]here . . . an employee serves no confidential, policymaking, or public contact role, the danger to an agency's successful functioning from that employee's private speech is minimal," *id.* at 390-91. But the Court did not suggest that this factor alone created any presumption against the employee; indeed, any presumption mentioned in that case was *in favor* of the employee. *Id.* at 388 n.13 ("a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee"). In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 716-19, 726 (1996), this Court recognized that the confidential/policymaking exception to government employment

---

Walker, 800 F.2d 613, 614, 616 (6th Cir. 1986) (per curiam).

decisions based on political association is distinct from the *Pickering* balancing test. And in *Connick*, while noting the political association cases, 461 at 142, 149, this Court analyzed the *Pickering* claim of an assistant district attorney--a highly confidential employee with great public contact whose position often depends on political association--in the standard manner. *Id.* at 142-54.

Moreover, in *Waters*, 511 U.S. at 674, this Court stated, "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Accord Bd. of City Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). How much truer is this of the confidential or high-level employee, who, as here, is in the best position--indeed, the only position--to offer not only informed opinions, but actual facts about the employer's misconduct?

Some circuits have held that even where the employee's position requires political association and the employee speaks publicly, the general *Pickering* balancing is performed. *Brady v. Fort Bend County*, 145 F.3d 691, 704-10 (5th Cir. 1998); *Horton v. Taylor*, 767 F.2d 471, 479-81 (8th Cir. 1985). Others have applied a presumption against the government employee simply because his or her position requires political association, *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1331-32 (9th Cir. 1997), or because the position requires political association *and* the speech involved that association in some manner, as opposed to being about the employer's misconduct.[29]

But none of the circuits other than the Second engage in a presumption against the government employee simply

---

[29] *Rose v. Stephens*, 291 F.3d 917, 920-23 (6th Cir. 2002); *Barker v. Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000); *Bonds v. Milwaukee County*, 207 F.3d 969, 976-82 (7th Cir. 2000); *McVey*, 157 F.3d at 277-82; *Flynn v. City of Boston*, 140 F.3d 42, 46-47 (1st Cir. 1998); *Cutliffe v. Cochran*, 117 F.3d 1353, 1355, 1358 & n.5 (11th Cir. 1997); *Hall v. Ford*, 856 F.2d 255, 258-65 (D.C. Cir. 1988).

because, like Petitioner,[30] he or she holds a confidential position, particularly where, as here, the employee's speech was in private and concerned the employer's misconduct. In fact, other circuits strike the *Pickering* balance in favor of confidential, policymaking, or high-level employees where the speech concerns the employer's misconduct--indeed, even where the employee speaks publicly. *See, e.g.*, cases cited *supra* pp. 22-23 note 28.

c. *Irrelevance of the Expletive*

Aside from the improper presumption, the only other factor upon which *Sheppard III* relied to strike the balance against Petitioner was his use of an expletive during the heated argument. (App. 27a-28a.) But, as Petitioner argued to both courts below, his position is that the protected speech which was a substantial or motivating factor in the discharge was his speech about misconduct, not the expletive. (*E.g.*, Pet. C.A. *Sheppard III* Br. 2, 28, 30-32, 40-42.) Thus, a jury must decide whether his position is correct about the motivations for the discharge, and then the court would determine whether Respondent has sustained his burden of proving that the disruption of the proper running of the office that would likely flow from that speech outweighed the value of the speech[31]--a balancing clearly in Petitioner's favor in light of the truth, value, and private nature of the speech.[32]

---

[30]In New York, judges "shall exercise the power of appointment impartially and on the basis of merit," N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3(C)(3) (2002); "shall not be swayed by partisan interests" in discharging their adjudicative responsibilities, *id.* § 100.3(B)(1); and are required to refrain from a large variety of political activities, *id.* § 100.5.

[31]*Waters*, 511 U.S. at 677, 679-82; *Connick*, 461 U.S. at 140-41, 148-50; *Mt. Healthy*, 429 U.S. at 281-87.

[32]While the expletive might be relevant to the defense that Respondent would have discharged Petitioner in any event, *Mt. Healthy*, 429 U.S. at 287, Respondent did not argue, and *Sheppard III* did not address, that defense, which would have involved a jury issue had it properly been raised.

II. MANY ADDITIONAL CONSIDERATIONS COALESCE TO MAKE THE GRANT OF CERTIORARI CRITICALLY IMPORTANT

A. This Is Most Likely the Court's Only Chance to Address The Issues Concerning the First and Fourth Amendment Rights of Law Clerks

Lawsuits against judges based on their employment decisions are uncommon. *See Forrester v. White*, 792 F.2d 647, 663 (7th Cir.) (Posner, J., dissenting), *rev'd*, 484 U.S. 219 (1988). The chances of a law clerk's suing a judicial employer are even smaller in light of the harm such a lawsuit could do to the clerk's career. Indeed, even with this Court's 1988 *Forrester* decision permitting damages actions against judges for their employment decisions and *Sheppard I*'s 1994 ruling ostensibly permitting law clerks to sue judges under *Forrester*, the undersigned has been unable to find any other case, state or federal, before or after 1988 in which a law clerk sued a judicial employer on any grounds. And now that the lower courts through their various published decisions in this case have reinforced the notion that a law clerk's attempts to correct improprieties of the part of the judiciary will only serve to hurt the law clerk's career (*e.g.*, App. 36a, 45a n.3; Pet. *Sheppard III* C.A. Br. 20-22, 27-28), it is hard to imagine that there will ever again be litigation before this Court which will enable it to review such questions as the right of privacy of law clerks and the right of law clerks to object to judicial misconduct, much less to correct the damage done by *Sheppard I* and *Sheppard III*.

B. No One Else Will Deal With Clandestine, Improper Attempts by Judges and Prosecutors to Obtain Convictions

Nor is there any reason to believe that the problems raised in Petitioner's speech will be addressed properly by anyone other than this Court. The New York Commission on Judicial Conduct has been described as a "quasi-indepen-

dent" body that bends to the winds blown by those at the highest levels of power in New York. Joyce Purnick, *Judge Wins This Round by Losing*, N.Y. Times, Apr. 24, 1996, at B1. A prosecutorial supervisor testified at his deposition that even his office does not complain to that commission or appellate judges about trial judges who engage in misconduct because judges "want to protect their own," and because a complaint would only result in retribution. (App. 178a-181a.) The New York State Bar Association recently rejected a proposal that lawyers be required to report serious misconduct on the part of judges, as the lawyers feared retribution from judges on whom they might report. Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges--A Proposed Solution to the Real Problem*, 25 Hofstra L. Rev. 729, 729-30 (1997). Various judges and law clerks testified at their depositions to their inability to recall situations in which: New York Supreme Court justices were disciplined for improper conduct in criminal cases; New York judges reported prosecutors to attorney disciplinary committees; or New York prosecutors were disciplined by such committees for actions taken as prosecutors.

Nor is there any reason to believe that the press will do anything. As a fellow Stanford law graduate and then primary *New York Times* legal columnist advised Petitioner a year *prior* to Petitioner's discharge, the press is not interested in judges who violate their oaths *against* criminal defendants. (*Id.* at 503-04.)

C. There Is No Reason to Believe These Problems Are Limited to New York

Nor is there any reason to believe that the problems raised in Petitioner's speech exist only in New York. In recent times, judges in Chicago and Philadelphia on a mass scale have committed crimes to help criminal defendants. Why would it come as any surprise, then, that judges would violate their oaths *against* criminal defendants, where the press is uninterested, the judges need commit no crimes, and prosecutors are actually involved in the misconduct? Indeed,

mass judicial misconduct takes place because judges, lawyers, and members of the press who know about it keep silent. Mervin Block, *Judges and the Press: The Power to Suppress*, 16 Loy. U. Chi. L.J. 445, 445-49 (1985); Anthony R. Valukas, *The Lesson of Greylord: Many Lawyers and Judges Tolerate Brethren Who Cheat and Lie*, 14 B. Leader 13, 14 (May-June 1986). As Judge Posner has observed, "'Judges tend to be rather clubby. Even when there are severe ideological disagreements, they tend to close ranks against the outside world.'" Christine C. Biederman, *In Center of Judicial Storm Is a Federal Judge in Texas*, N.Y. Times, Nov. 5, 1995, § 1, at 24. Nor do prosecutors have any cause to fear repercussions from their misconduct against criminal defendants. Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 Hofstra L. Rev. 121 & articles cited therein (2001).

D. Denial of Certiorari Will Proliferate Misconduct

In *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), this Court approvingly quoted most of the following language from Justice Brandeis's famous dissent in *Olmstead v. United States*, 277 U.S. 438 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against this pernicious doctrine this Court should resolutely set its face.

Id. at 485. Violations of the Constitution and other laws on the part of judges and prosecutors only breed or necessitate still further violations and false denials thereof on the part of themselves and their colleagues. Indeed, now that, through this lawsuit, Petitioner has managed to air some of the issues

to some extent, if this Court does not grant certiorari to set right what the lower federal courts have said and done in this case, how much more likely will it be that judges and prosecutors, including some who may not have indulged before, will engage in misconduct of the sort concerned herein, not only safe in the knowledge that the federal courts will do nothing to intercede, but with those courts' implicit approval of such misconduct?

E. The Misconduct at Issue Does Not Harm Only *Guilty* Criminal Defendants

When this Court stated in *Mapp* that "[t]he ignoble short cut to conviction left open to the States tends to destroy the entire system of constitutional restraints on which the liberties of the people rest," it was referring to Fourth Amendment violations. 367 U.S. at 660. But the types of constitutional violations involved here--judges taking various surreptitious steps, including ex parte communications with prosecutors, to enhance the likelihood of conviction[33]--create the risk of convicting innocent persons. Indeed, not only is this risk present where judges and prosecutors--who by definition do not have all available information prior to trial--decide to violate the law to increase the chances of convicting a person *they believe to be guilty*,[34] but such improper behavior is hardly limited to such situations. Here, for example, in one of the two cases in which Respondent was engaging in misconduct at the time of Petitioner's discharge, Respondent had announced to Petitioner his intention to do all he could to ensure the defendant's conviction as soon as

---

[33] *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2535 (2002); *Yohn v. Love*, 76 F.3d 508, 516-17 (3d Cir. 1996); *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1982).

[34] In the case which was the immediate impetus of the argument between the parties, after the ex parte attempt by Respondent and the State to have an immediate murder trial was thwarted by Petitioner's actions, the State ultimately dismissed the charges against the defendant, who would have received a life sentence if convicted.

Respondent learned of the defendant's rearrest, as Respondent was angry about the rearrest. *See supra* pp. 2-3; *Liteky v. United States*, 510 U.S. 540, 555 (1994).

The exoneration of wrongfully convicted defendants normally is the product of pure luck. James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2048-51 n.84 (2000). But the sorts of constitutional errors involved herein will never surface in individual cases, much less en masse, unless an insider like Petitioner blows the whistle. The problem is exacerbated by the many procedural roadblocks erected by this Court to habeas corpus petitions on the assumption--rendered dubious by the instant case--that state judges and prosecutors conscientiously attempt to follow federal law, *e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635-36 (1993), and by this Court's recent decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), which removes state-imposed barriers to judicial candidates' campaign statements about the likelihood that criminal defendants before them will be convicted. *See id.* at 2536 n.7, 2538-39; *id.* at 2542 (O'Connor, J., concurring); Liebman, *supra*, 100 Colum. L. Rev. at 2069 & n.115, 2111-14.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN SHEPPARD, ESQ.
Counsel of Record for Petitioner
516 N. 9th Street--Second Floor
New Hyde Park, NY 11040
(516) 358-7599

June, 2003